COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1366

GERARD P. O'CONNOR & others[1]

vs.

BOARD OF APPEAL OF BOSTON & another.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In this appeal we must interpret an ambiguous set of provisions in the Boston zoning code (code). The plaintiffs, led by Gerard P. O'Connor, an attorney, brought suit in Superior Court after defendant board of appeal of Boston (board) denied the plaintiffs' appeal from a decision of the Boston inspectional services department (ISD) that found that codefendant Debbie LLC (Debbie) was complying with the conditions of its certificate of occupancy. A Superior Court judge granted summary judgment in favor of the defendants. Plaintiff O'Connor appeals.

Background. We summarize the facts in the record in the light most favorable to the nonmoving parties, here, the plaintiffs. See Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass.

[1] Elizabeth O'Connor, Curtis Woodcock, and Barbara Shaw.

[2] Debbie LLC.

117, 120 (1991). Debbie owns the property at 501 Arborway in the Jamaica Plain neighborhood of Boston, which is in the Morton Street local convenience subdistrict (subdistrict) for purposes of the code. The building contains the dental practice of Vincent J. Morgan. It also houses employees of Bicon LLC (Bicon), a company that manufactures dental implants. Morgan is an employee of Bicon. Approximately ten dentists work in the building as either employees or independent contractors, four of whom perform dental implant surgery or oral surgery. The building contains eleven rooms with dental chairs for patients, three on the second floor and eight on the first floor. The second floor also contains observation space. Conferences, training sessions, and seminars are occasionally held on the second floor.

To understand this case, one must be aware of the details of the code with respect to several different possible uses of the property. First, there are two relevant types of "[o]ffice [u]ses" that are permitted in the subdistrict without a conditional use permit, "[a]gency or [p]rofessional [o]ffice," and "[g]eneral [o]ffice." "Office [u]ses" is defined by the code as "[a]gency or [p]rofessional office, back office, or general office." "Agency or [p]rofessional [o]ffice" is defined as "[a]ny room, studio, clinic, office or suite wherein the primary use is the conduct of business by professional persons,

whether or not requiring professional license, such as attorneys, physicians, architects, insurance agents, professional managers and agents, consultants, writers, and the like." "General [o]ffice" is defined as "[t]he use of a structure or land principally for office space. Such use shall not involve manufacturing, repair, or storage of materials, goods, or products which are physically located on the premises."

There are also two relevant types of "[h]ealth [c]are [u]ses" for which one requires a conditional use permit, operation of a "clinic," and operation of a "clinical laboratory." The code defines "[h]ealth [c]are [u]ses" to mean "[c]linic; clinical laboratory; custodial care facility; group care residence, general; hospital; or nursing or convalescent home." It defines "[c]linic" to mean "[a] place for the medical or similar examination and treatment of persons as outpatients." It offers no definition of "clinical laboratory."

It is important to note that the word "clinic" appears in both "[a]gency or [p]rofessional [o]ffice," which refers to "[a]ny . . . clinic . . . wherein the primary use is the conduct of business by professional persons" and in the definition of "[h]ealth [c]are [u]ses." Although our disposition does not require us to explore the question further, this appears to mean that some "clinics" are "[a]gency or [p]rofessional [o]ffices,"

an "[o]ffice [u]se" that requires no conditional use permit, while others are "[h]ealth [c]are [u]ses" that do require such permits.

Finally, "[p]rofessional [s]chool" is a use that is permitted in the subdistrict, but only on the second floor and above. The code defines "[p]rofessional [s]chool" as "[a]n institution which offers courses of instruction in any of several fields of study and/or in a number of professions or occupations, and which is not part of a college, university or trade school."

On February 13, 2009, ISD issued a certificate of occupancy to Debbie for the property. The permitted uses were "[g]eneral [o]ffices & [p]rofessional [s]chool."[3] On May 28, 2015, the plaintiffs sent a letter to the commissioner of ISD requesting that ISD revoke the certificate of occupancy. In the letter, they alleged that the property contained a "dental clinic" and a "clinical laboratory," which they alleged required a conditional use permit that Debbie did not have, and that Debbie was operating a professional school on the first floor of the property, which the code forbids. Because the letter to ISD argued that the use as a "dental clinic" required a conditional use permit, we interpret the plaintiffs' allegation to be that,

[3] The address on the certificate of occupancy is 123 Morton Street. The parties agree that this is the same property as 501 Arborway.

to the extent the property was being used as a "[c]linic," it was a "clinic" under "[h]ealth [c]are [u]ses," not under "[a]gency or [p]rofessional [o]ffice."

A deputy commissioner from ISD, Harold McGonagle, conducted an inspection and found that Debbie was in compliance with the certificate of occupancy. McGonagle's report described the certificate of occupancy as allowing the use of "offices and professional school." In describing what he meant by "offices," McGonagle stated that "office use included occupations such as 'attorneys, physicians and the like.'" The plaintiffs were informed of ISD's decision in a letter to O'Connor dated July 31, 2015. The plaintiffs disputed that the letter was written on that day, and O'Connor testified that he did not receive it until November 3, 2015.

On December 14, 2015, the plaintiffs appealed ISD's decision to the board under § 8 of the Boston zoning enabling act, St. 1956, c. 665, § 8, as amended (act). As reasons for the appeal, they stated, "[t]he appellant seeks a determination that the certificate of occupancy issued to Debbie LLC for 113 [sic] Morton Street (the 'Property') was improperly issued and must be revoked. The uses of the Property, which include a dental clinic, clinical laboratory and professional school, require a conditional use permit as well as one or more zoning variances."

After a hearing, the board affirmed ISD in a brief decision. The decision stated that "the appellant has not proven that Bicon is using the property as a 'clinic' or 'clinical laboratory' without a conditional use permit or as a 'professional school' below the second story of the building. It further finds that, based on Deputy Building Commissioner Harold McGonagle's floor by floor review of the premises, Bicon is in fact using the property in compliance with its certificate of use and occupancy."[4]

The plaintiffs appealed to the Superior Court pursuant to § 11 of the act. A judge of that court granted summary judgment in favor of the defendants, affirming the board's affirmance of ISD's determination that the use was in compliance with the certificate of occupancy. The judge reasoned that the type of treatment being performed at the premises did not satisfy the definition of "[c]linic" because it did not involve treatment

[4] On December 31, 2015, after the appeal was filed but before the board heard and decided it, ISD issued a new certificate of occupancy for the property, stating again that the uses were "[g]eneral [o]ffices & [p]rofessional [s]chool." That certificate declared all prior ones "null and void." Nobody has explained why ISD issued a new certificate. While the appeal to the board was from ISD's determination regarding compliance with the 2009 certificate, Debbie does not argue that the new certificate mooted the issue before the board or otherwise affected its jurisdiction. Since the certificates permitted identical uses, we conclude that the issue is not moot, and that it would elevate form over substance to hold that the issuance of the new certificate otherwise divested the board of its jurisdiction.

"as an outpatient," because the patients' "level of anesthetization and risk or urgent complications is low enough to be done in a professional office." The judge thus concluded that "[i]n-office dental surgery is just as much a 'professional office' use as other forms of dentistry." The judge also concluded that there was insufficient evidence in the summary judgment record that there was a professional school on the first floor of the building. This appeal followed.[5,6]

Health care use. The plaintiffs' argument that there is a health care use, rather than an office use, at the property turns on their assertion that Debbie operates a "clinic."[7] (As described above, it appears that not all clinics are "[h]ealth [c]are [u]ses," but status as a clinic is necessary to the plaintiffs' argument.) We must defer to the board's construction of its statute. See Miles-Matthias v. Zoning Bd. of Appeals of Seekonk, 84 Mass. App. Ct. 778, 786 (2014). We cannot say it is unreasonable for the board to construe the word "clinic" not to include the type of use described in McGonagle's report, and to conclude that this was, instead, an "office use."

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[5] Of the defendants, only Debbie submitted a brief.

[6] Debbie argues that the plaintiffs' appeal to the board was untimely because it was not within forty-five days of ISD's decision as required by § 8 of the act. O'Connor responds that there is a genuine issue of material fact as to when ISD made its decision. We assume without deciding that the plaintiffs' appeal to the board was timely.

[7] Before us, O'Connor advances no argument that Debbie operates a "clinical laboratory."

Obviously, the line under the code between, for example, a suite of doctor or dentist offices and a clinic is not a bright one, and the board has not spelled out where precisely it lies. But the board may develop the law in this area in a common-law manner. As the board has construed "clinic" not to include uses such as those undertaken by Debbie in this case, parties in future cases may rely upon this construction going forward unless the board articulates a "reasoned basis" for changing it (citation omitted). Massachusetts Bay Transp. Auth. v. Labor Relations Comm'n, 425 Mass. 253, 260 (1997).[8]

Professional school. In the relevant subdistrict, the "professional school" use is unconditionally authorized on all floors except the basement and the first floor, where it is forbidden. The plaintiffs argued that Debbie operates a professional school on the first floor of the property, in violation of the code. McGonagle's report says that the first floor "contained the reception area as well as offices and meeting rooms. There were also some typical dental rooms and a lab with grinding and sterilization equipment associated with dentistry[.] There also is an employee lounge/cafeteria on this floor." According to McGonagle, the second floor contains "more

[8] O'Connor argues on appeal that even if there is an office use at the property, it is as an "[a]gency or [p]rofessional [o]ffice," not as a "[g]eneral [o]ffice" as permitted by both the 2009 and 2015 certificates of occupancy. We express no opinion on that question, which was not raised before the board.

offices as well as conference and meeting rooms. There are three dental rooms as well as observation space. There are conferences, training sessions and seminars held on occasion on this level."

The existence of meeting rooms on the first floor does not create a triable issue of fact as to whether there is a professional school on the first floor, and the plaintiffs pointed to no other evidence in the summary judgment record that there is a professional school on the first floor. In the absence of a genuine issue with respect to that question, summary judgment was properly granted to the defendants.

O'Connor argues that some photographs in the record are evidence of a professional school on the first floor. These photographs are from Bicon's Facebook page, and appear to depict a cocktail party, a meeting, and individuals working on the construction of dental implants. While some of these photographs might be evidence of a professional school somewhere on the property, there is nothing in them to suggest that they were taken on the first floor. O'Connor also argues that the deposition of Thomas D. Peterson, an authorized employee of Debbie, referred to these photographs. The incomplete transcript of that deposition that has been submitted to us reveals that some photographs were shown to Peterson, but contains nothing to suggest that there was a professional school

on the first floor. Peterson was asked whether he recognized the "scene" in a certain photograph, and he responded, "[a]ppears to be the general office waiting room." Peterson was asked whether he recognized the "scene" of another photograph that, according to the questioning attorney, apparently depicted staff preparing for a cocktail reception, but his answer was not submitted to us. If this is a reference to the photographs in our record, there is nothing to suggest they were taken on the first floor. There also appears to be a reference to a third photograph indicating that some Bicon employee is working at a "lab," but when asked where the lab was, Peterson said that he did not recognize where the photograph was taken and that the employee lived and worked in Italy. This might be a reference to the photographs of the construction of dental implants, but, again, there is nothing in those photographs to indicate that they were taken on the first floor, and their relevance to the

professional school argument is unclear.[9]

Judgment affirmed.

By the Court (Rubin, Desmond & Ditkoff, JJ.[10]),

Joseph F. Stanton

Clerk

Entered: June 25, 2019.

[9] The plaintiffs also requested costs under § 11 of the act, alleging that ISD acted in bad faith by withholding the McGonagle report and the ISD decision letter from the plaintiffs. That section authorizes costs against the board, but only if "the board in making the decision appealed from acted with gross negligence, in bad faith or with malice." The plaintiffs did not allege any misconduct on the part of the board. Therefore they are not entitled to costs.

[10] The panelists are listed in order of seniority.